Some Observations on the California Development Company Litigation.

A LITIGATION which will be somewhat historic in the southern end of the state at least, has recently been concluded by the decision of the Supreme Court in the case of Title Insurance & Trust Company v. California Development Company,[1] decided October 9, 1915. This litigation was started for the purpose of foreclosing a deed of trust, securing an issue of bonds upon the water system of the California Development Company. This system supplies the great and fertile Imperial Valley with water from the Colorado River, being the only source of supply that district has. Owing to the wide public interest in the case as well as to the many novel and important legal questions which it has raised, the editors of the California Law Review have thought that some observations upon it might be interesting, and perhaps of some value to the profession.

But a few years ago the so-called Colorado Desert was a vast desolate waste. Today the same country, world-famous as the Imperial Valley, is made up of wonderfully fertile and productive fields, which produce enough food products to supply a principality, and almost enough cotton to clothe one, and in the future, with intensive cultivation, will undoubtedly produce many times as much of good as it now does. It seems one of the ironies of fate that the company which brought water to this district and made possible this wonderful transformation should itself have fallen by the way-side and become so involved in financial difficulties that its extrication was hopeless and necessitated foreclosure proceedings. Yet such is the case. This state and this nation owe a large debt to the men who founded this enterprise and gave it their time, money and labor. Especially is this true of C. R. Rockwood, the engineer, who for years struggled to secure the financial backing necessary to undertake the project,

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[1] (Oct. 9, 1915), 50 Cal. Dec. 381, 152 Pac. 542.

and who through succeeding years brought it to fruition, only to lose practically everything in the financial difficulties in which the company became involved. However, he has now been made Chief Engineer of the Imperial Irrigation District, which, it seems likely, will in the near future own and operate this great system for the benefit of the people of Imperial Valley.

One of the matters which has greatly complicated the litigation is the fact that by far the largest portion of the water system lies in the Republic of Mexico. The intake where the water of the Colorado River is diverted into the system is at a point known as Hanlon's Heading, in California, only a short distance north of the boundary line, but it was impossible to convey the water from the river to Imperial Valley proper in American soil on account of a range of sand hills lying between the valley and the river but which did not extend into Mexico. For this reason the system as constructed runs only a very short distance in American territory, and for practically fifty-seven miles is in Mexican soil. The system thus begins in American soil at the intake, runs for nearly its entire distance in Mexican territory, and returns to American soil in the Imperial Valley proper. The founders of the project found it was impossible under Mexican laws for an American corporation to own the land in Mexico through which the main canal had to run. They were obliged, therefore, to organize a corporation under the laws of Mexico, which has been generally known as "The Mexican Company," which held title to that portion of the system lying in Mexico. This corporation was organized with twelve thousand five hundred shares of stock, the same number as the California Development Company. Twelve thousand shares were held directly by the Development Company, the other five hundred being issued to two of the stockholders and promoters of that company. In order to raise money to build the system, a deed of trust was executed in 1900 by the California Development Company whereby all of the properties in California were deeded to the Title Insurance & Trust Company, as trustee, and the twelve thousand shares of the capital stock of the Mexican Company were pledged to the trustee. The deed of trust also contains provisions which the courts have held clearly evidenced the intention that all the property of the Mexican Company should be made security for the bonds. Two years later and in further pursuance of said intention, the Mexican Company executed and delivered to said trustee, in California, a

mortgage on its property in Mexico, but for certain reasons not important here, neither the deed of trust nor mortgage were ever recorded in Mexico. There was at that time, and still is, in force in Mexico a statute providing in substance that no mortgage of land shall have "any legal effect except from the day and hour that it is recorded."

In 1904 there came a break in the banks of the Colorado River by means of which the flow of that great river was diverted into the Imperial Valley. The Salton Sea was formed, and it appeared likely that the entire valley would be made a great inland sea. The break was finally stopped through money loaned to the Development Company by the Southern Pacific Company. As a result of the break the Development Company became hopelessly involved in financial difficulties, and the Southern Pacific Company came into actual control both of the California Development Company and the Mexican Company through having its officers and employees made members of the board of directors of these companies. Thereafter the Southern Pacific Company brought suit in the courts of Mexico against the Mexican Company and secured judgments for large amounts. It then organized another corporation under the Mexican laws which we will term the New Mexican Company, all of whose stock it held. The properties of the Mexican Company were then sold at execution sale under the judgments rendered by the Mexican court, and were bought in by the New Mexican Company.

Without going into greater detail, suffice it to say that the interest on the bonds not having been paid, the Title Insurance & Trust Company, in November, 1909, upon demand of certain bondholders, commenced an action in the courts of California whereby it sought to foreclose the deed of trust and mortgage on the entire system. A receiver was immediately appointed for the properties of the California Development Company who has ever since operated them. In passing, it is only fair to state that under the administration of Mr. W. H. Holabird, of Los Angeles, who has acted as receiver, deliveries of water have been greatly increased, many old structures have been replaced by new and better ones, and the service given by the system in every way greatly improved, much to the benefit of the Imperial Valley. The administration has in every way been a gratifying contrast to the history of many American receiverships, and has demonstrated that the prevailing

idea that a receivership means inevitable loss to all parties concerned is by no means necessarily true.

The first question presented by the case arose from the fact that the system lay in two different countries. It should be explained, if it has not already been made clear, that the flow of water was continuous from the intake in California, across the boundary line into Mexico, and for a number of miles through Mexico, and back again into California, where it was distributed for use. The system was and is, therefore, in its very nature essentially a unit and absolutely indissoluble. A foreclosure on the two tag ends of the system in California would have been for all practical purposes entirely fruitless, for that property consisted simply of an intake with no way of getting water to the lands to be cultivated except through the Mexican canal, and of certain distributing works with no water to be distributed except that received through the Mexican canal. For various reasons it was impossible to go into the courts of Mexico, and as already pointed out, there was a statute in force in Mexico which rendered both the deed of trust executed by the Development Company and the mortgage executed by the Mexican Company "of no legal effect" in that country. Moreover, it was and is perfectly clear, that the courts of the United States have no jurisdiction to render a decree in rem foreclosing a mortgage on property situate outside this territorial jurisdiction. To meet these difficulties the Mexican Company and New Mexican Company were made parties to the action and they duly appeared. The Southern Pacific Company was also a party. The plaintiff thereupon sought a decree to the effect that it was the intention of the California Development Company and of the Mexican Company in the execution of the trust deed and mortgage above referred to, to make the entire system security for the payment of the bonds; that thereby an equitable, as distinguished from a legal, lien was created; or in other words, that there was thereby created, under the laws of California, where both the deed of trust and mortgage were executed and delivered, a *personal* duty and obligation to apply all of such property to the payment of the bonds; that since the evidence showed that both the New Mexican Company and the Southern Pacific Company had full notice of the execution of the deed of trust and mortgage and of the intent thereby to make the Mexican property security for the bonds, these companies, therefore, were equally bound by this personal obligation to make

such application of said properties, and therefore that the court should render a decree in personam requiring that all of the property should be so applied. The jurisdiction of the court to make such decree in personam, even though it affected indirectly land lying outside the territorial district, is firmly established, as will be hereafter shown. It was strenuously contended by the defendants, however, that the California court could make no such decree, since under the Mexican law, which was, of course, the law of the situs of the Mexican property, the deed of trust and mortgage were of no legal effect because they were unrecorded. Plaintiff's answer to that contention was that the California court was not asked to establish or enforce any rights arising under the laws of Mexico; that indeed the laws of Mexico had no application or connection with the right sought to be secured and enforced; that what plaintiff was seeking to secure was the enforcement of the personal obligation created in California, under California law, by the execution and delivery here of certain instruments whereby the Development Company and the Mexican Company obligated themselves personally to apply the Mexican property to the payment of plaintiff's claim. Plaintiff therefore contended that this was a right, contractual and personal in its nature, which was created in California, under the laws of California, and was, therefore, governed by the laws of California, and could not be affected by the laws of Mexico. The defendants also raised certain other objections to the granting of the relief sought by the plaintiff of a somewhat less fundamental nature. Among others they contended that it was a legal impossibility that the California Development Company could be the equitable owner of the properties held by the Mexican Company since five hundred shares of stock of the latter company were held by persons other than the Development Company. To this it was replied that the evidence showed that these other persons, who as already indicated were stockholders and promoters of the Development Company, while they took the nominal title to said shares, really took them as agents of and trustees for the Development Company, and that it was the intention of all persons that such stock should be so held, and that the Mexican Company was and should be a mere agency of the Development Company. The defendants further contended that the title to the properties in Mexico asserted by the New Mexican Company was "adverse" to that sought to be foreclosed by

plaintiff, and, therefore, that the question could not be litigated in an action to foreclose a mortgage. To this it was replied that whatever title the New Mexican Company had was derived through and from the Mexican Company, with notice of plaintiff's rights, and that the mere fact that the New Mexican Company did not recognize such rights did not give it any such title as would prevent the enforcement by plaintiff of whatever rights the deed of trust and mortgage may have given. Certain other contentions, which we will not take the time here to present, were also made, but the foregoing were the most important.

After a long and hard fought trial the Superior Court adopted the views advanced by the plaintiff both as to facts and law and rendered a decree directing the Southern Pacific Company to deliver to a commissioner appointed by the court all of the shares of stock of the New Mexican Company, and directing the holders of the outstanding five hundred shares of stock of the old Mexican Company to deliver them to the commissioners; directing the commissioners to sell all of that part of the system lying in California, together with the dredgers and other property used in connection therewith, and all of the stock of both the old Mexican Company and the New Mexican Company, as one parcel, and without any right of redemption, and enjoining the Southern Pacific Company and the New Mexican Company from ever making or asserting any claim of title to any of the property in Mexico adverse to that acquired by the purchaser at the sale. There were other features of the decree, but we will not take the space to present them. No attempt was made to affect the title to any of the Mexican property, except as that might result from the performance of the acts directed to be done.

From this decree an appeal was taken to the Supreme Court by the Southern Pacific Company and the New Mexican Company. After long consideration the Supreme Court, in an opinion rendered by Mr. Justice Sloss, and without any dissent, affirmed the judgment of the trial court with reference to all the matters hereinbefore set out. The court held that the power of the court of equity, having jurisdiction of the persons, to render a decree operating in personam requiring them to do some act with reference to property, even though it lay outside the jurisdiction, was unquestionable. It referred to the case of Toller v. Carteret,[2]

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[2] (1705), 2 Vern. 494.

decided in the year 1705, which is so far as we know the earliest case dealing with this subject, Penn v. Baltimore,[3] decided 1750, and numerous other cases since these dates establishing this proposition without question. It then held that the provisions of the deed of trust and mortgage showed clearly an intention to make the property in Mexico security for the repayment of the bonds, and that this created the equitable lien or personal obligation to apply the property in Mexico to the payment of the bonds, which was enforceable in California, irrespective of the Mexican law. The court did not discuss extensively the question of conflict of law, as it may be termed, between California and Mexico, but adopted the rule that since the personal obligation sought to be enforced was created in California and under the laws of California it should be enforced here. This question may, therefore, warrant a little further discussion in this article.

It would seem clear that if A and B, being in California, enter into an agreement, whereby A agrees to sell B a piece of land, wherever situated, accepts the purchase price from B, and agrees to give a deed, this creates an obligation under the laws of California so to do. It clearly would make no difference what the law of the situs of the property might be as to the requisites for passing title. The transaction having occurred in California, the law of California would impose on A the duty of executing and delivering the deed, and this duty might be enforced by personal process of the California courts, they having jurisdiction of the person of A. The same would be true if B loaned money to A upon A's agreement to give a valid mortgage. No matter what the law of the situs of the real estate might be, the law of California would impose upon A the obligation to do all things necessary to give B a valid lien upon the property, which obligation personal in its nature, would be enforced by the California courts. This action on the part of the California courts would not be at all inconsistent with the general proposition that the law of the situs governs with reference to the passing of title and the creation of liens upon real property. The California courts in making such a decree as indicated would not attempt to make any decree binding upon the property. They would simply require A personally to do that which, by virtue of the transaction had in

[3] (1750), 1 Ves. Sr. 444.

California, the law of California required him to do. The authorities are to the same effect. In Ex parte Pollard,[4] a person in England borrowed certain money, and deposited as security the title deeds to certain land in Scotland. Under the laws of Scotland no legal or equitable mortgage was created by the deposit of title deeds. Yet in an action brought in England, after the debt matured, to secure a personal decree obligating the borrower to transfer title to the property in Scotland, it was held in an able and elaborate opinion that a personal obligation was created by the transaction in England under the laws of that country so to do, and that a court of equity could and should compel the defendant to perform this obligation. Lack of space prohibits any extensive review of the decision. Lord Cranston v. Johnston[5] involved a state of facts somewhat different, but presented the same question, namely, a transaction which under the laws of the situs of the property created no lien, but which under the law of England did create a personal obligation to make certain disposition of the property. Sir Richard Arden, Master of the Rolls, held that it was clearly the right and duty of the court of equity having jurisdiction of the person of the defendant to compel him by personal decree to make such disposition of the property as the equities of the case required. In the famous case of Pennoyer v. Neff,[6] the same principle was recognized, and it was held that the exercise of this personal jurisdiction "in no manner interferes with the supreme control over the property by the state within which it is situated." In Polson v. Stewart,[7] certain persons in North Carolina made a contract with reference to property situated in Massachusetts which was valid under the laws of North Carolina, but which would have been void if made in Massachusetts. In an able opinion by Mr. Justice Holmes, it was held that since the contract was valid by the laws of North Carolina, where it was made, the courts even in Massachusetts would specifically enforce it. In Selover, Bates & Company v. Walsh,[8] plaintiff and defendant had entered into a contract in Minnesota for the purchase and sale of lands lying in Colorado, which contract provided that in the event of default the seller

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[4] Mont. & C., 239.
[5] (1796), 3 Ves. 170.
[6] (1877), 95 U. S. 714, 723, 24 L. Ed. 565.
[7] (1897), 167 Mass. 211, 45 N. E. 737.
[8] (1912), 226 U. S. 112, 57 L. Ed. 146, 33 Sup. Ct. Rep. 69.

might terminate the rights of the purchaser. This was permitted by the laws of Colorado, but the laws of Minnesota prohibited the seller from forfeiting the rights of the purchaser until certain notices had been given and a certain time had elapsed. The Supreme Court of the United States held that notwithstanding that the land was situated in Colorado, the laws of Minnesota governed. Ex parte Holthausen[9] was a case where certain title deeds had been deposited as security. It was held that since the laws of the place where the transaction occurred recognized that such a transaction created an equitable obligation the courts of that place would compel the parties so to apply the property. Mercantile Investment Company v. River Plate Company[10] involved a situation much like the main case. A deed of trust was executed in England upon certain lands lying in Mexico but was never recorded in Mexico. It was held that the transaction created in England an equitable obligation to apply the property, and that this would be enforced personally in England irrespective of Mexican law. The case of Atwood v. Walker,[11] seems also in point. There is another line of cases which seems to be analogous. We refer to those cases holding that where a note and mortgage are executed in one state covering property in another providing for a rate of interest valid in the state where made, but which would render the mortgage void if made in the state where the land is situated, both mortgage and note are valid.[12]

As heretofore pointed out, the decree directed the sale of the real estate in California, all of the capital stock of the two Mexican Companies and all dredgers and other machinery and personal property used in connection with the operation of the system, as one parcel and *without right of redemption* as to any of it. The validity of this portion of the decree presented a very interesting question. Section 700a of the Code of Civil Procedure provides that sales under foreclosure of personal property, and of real property when the estate therein is less than

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[9] (1874), 9 Ch. App. 722.

[10] (1892), 2 Ch. Div. 303.

[11] (1901), 179 Mass. 514, 61 N. E. 58.

[12] DeWolf v. Johnson (1825), 10 Wheat. 367, 6 L. Ed. 341, is a leading case of this character; another is Manhattan Ins. Co. v. Johnson (1905), 188 N. Y. 108, 80 N. E. 658. Numerous authorities to the same effect will be found collected in 39 Cyc. 905.

a lease-hold of two years' unexpired term, are absolute; that in all other cases the property is subject to redemption. The estate so directed in the decree to be sold in that part of the system in California was a fee; hence under the literal terms of the statute referred to, it would have been necessary to sell the same subject to a right of redemption. Upon a moment's reflection, however, it will be clear that to have sold absolutely the capital stock of the two Mexican companies and the dredgers and other property used in connection with the operation of the system, while the part of the system lying in California was sold subject to right of redemption, would have resulted not only in difficulties of the greatest character as to the amount of redemption money required, etc., but what is far more important, might well have resulted in the segregation of the system, which was by its very nature a unit and indivisible, with the greatest loss to all concerned. To have made the sale in this manner, moreover, would almost necessarily have resulted in greatly diminishing the price at which the property could be sold, as the purchaser could not be assured that he would acquire a water system, but on the contrary would be faced by the dilemma that he might lose through redemption the intake and distributing works in California and have left only the capital stock of the two Mexican Companies owning a part of a canal in Mexico. As already indicated, the Supreme Court sustained the decree directing the sale of the entire property without right of redemption; and this is in accordance with decisions.

In the case of Hammock v. Loan & Trust Company,[13] the Supreme Court of the United States held that a general statute similar to the California statute would not apply where a railroad was sold as an entire system pursuant to a deed of trust or blanket mortgage. The court pointed out that to follow the statute literally might result in the segregation of real estate and personal property which physically and necessarily constituted a unit, with consequent and inevitable loss to all parties concerned, and that, therefore, the general statute giving the right of redemption could not be understood as applying to such a case. This decision has been frequently followed not only with regard to foreclosures upon unified systems impressed with a public character, but with reference to other properties, which by reason of their nature and

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[13] (1881), 105 U. S. 77, 26 L. Ed. 1111.

use were necessarily a single unit. In Columbia Finance & Trust Company v. Kentucky Union Railway Company,[14] the Circuit Court of Appeals said:

> "The controlling reasons which induced the decision in Hammock v. Trust Company sprang from a consideration of the *unity* of the railroad property."

In Pacific Northwest Packing Company v. Allen[15] the Circuit Court of Appeals of the Ninth Circuit sustained a similar decree on foreclosure of a mortgage upon property consisting of harbor area, wharf, fishing and fish canning plant and personal property used in connection with such business. In the course of its opinion the court says:

> "From its character, situation and surroundings, it was necessary in the interest of all parties directly concerned that there should be no redemption. The entire plant, with all its buildings, structures, machinery, fixtures, appliances, franchises, and rights must necessarily be treated as an entirety. Separation of the real estate, if any part of the property could be treated as such, would destroy the efficiency and value of the whole. The true doctrine upon which the principles above stated are founded, is that of *necessity arising from the condition and character of the property mortgaged.*"

In the case of Continental Bank v. Corey Brothers' Construction Company,[16] the same court sustained a similar decree foreclosing a lien without right of redemption upon an irrigation system which consisted both of real and personal property. In McKenzie v. Bismarck Water Company,[17] the same principle was followed.

It was strenuously contended by the Southern Pacific Company that inasmuch as the New Mexican Company had acquired legal title under Mexican law to the property situated in Mexico, pursuant to the judgment of the Mexican court, that the California courts had no jurisdiction to deprive it, either directly or indirectly, of the fruits of such judgment. This claim, however, was directly overruled by the Supreme Court. It pointed out that at the time the New Mexican Company purchased the properties, both it and the Southern Pacific Company had full notice of the equitable claims of the plaintiff, and moreover—although this latter consideration is probably not essential to the decree in favor of

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14 (1894), 60 Fed. 794.
15 (1902), 116 Fed. 312.
16 (1913), 208 Fed. 976.
17 (1897), 6 N. Dak. 361, 71 N. W. 608.

plaintiff—that the Southern Pacific Company through being in actual control of both the Development Company and the Mexican Company, occupied a fiduciary relation towards the creditors of those companies. The opinion points out that, while under section 1915 of the Code of Civil Procedure the courts of this state are required to give the same effect to final foreign judgments as would be given to final judgments rendered in California, nevertheless, it is well established that a court of equity always has power both to inquire whether a judgment has been obtained by fraud, and to "prevent an inequitable advantage being taken by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauding party."

The Southern Pacific and New Mexican Companies further contended that the court could not set aside, either directly or indirectly, the sale in Mexico without showing that the judgment on which such sale was based was unmeritorious. This contention also was overruled, the court pointing out that a judgment rendered under the circumstances shown with reference to the Mexican judgment (such judgment was confessed by the Mexican Company acting through the board of directors composed of officers and agents of the Southern Pacific Company) "cannot under the security of a court of equity occupy any different position from that of the voluntary transfer by a Mexican Company to the Southern Pacific Company."

The foregoing considerations apply to the judgment in so far as it foreclosed the lien in favor of the plaintiff. There is, however, another interesting phase in the litigation. Some time prior to the commencement of the main case, the New Liverpool Salt Company had recovered a judgment for a large amount in the Federal Court in California against the California Development Company, which judgment became a lien upon the real estate in California. That company subsequent to the institution of foreclosure proceedings by plaintiff, filed an independent action and also filed a cross-complaint in the foreclosure proceedings, wherein it set up the facts showing the relation of principal and agent between the Development Company and the Mexican Company, alleged that the properties nominally held by the Mexican Company were in truth and in fact held by it merely as agent of the Development Company, and sought under the principles applicable to creditors' bills to have the court marshall the assets of the Development Company, and thus in effect give it a lien upon the

entire system, both that lying in Mexico as well as in California. The trial court sustained the contention of the Salt Company and rendered a decree accordingly, giving to it substantially a lien upon all of said property second only to that of the plaintiff. This holding was in the main sustained by the Supreme Court under the principles of Seymour v. McAvoy[18] and Chittenden v. Brewster.[19] It was also shown that after the Southern Pacific Company acquired dominion over the Development Company, it caused said company to transfer to the Southern Pacific Company certain valuable assets of the Development Company, and it was found by the trial court and sustained by the Supreme Court that this transfer was made with intent to hinder, delay and defraud the creditors of the Development Company. It was held, therefore, that this transfer was clearly void as to creditors. Probably the most interesting feature of this part of the case, however, arose out of this situation: Some time prior to the filing of the creditor's bill by the Salt Company, the Southern Pacific Company brought an action against the Development Company, and in that action had attached substantially all of the stock of the old Mexican Company. In this action it obtained judgment against the Development Company in a large sum. The trial court held this attachment to be void on several grounds; among others on the ground that the Southern Pacific Company was at the time in absolute control and dominion of the Development Company and was, therefore, disqualified from acquiring any lien on its property, and also on the ground that the affidavit on which the writ of attachment was issued was false, in so far as it stated that the debt on which it was based was unsecured. This holding of the trial court was reversed. The Supreme Court held that while it was true that a person having actual control and dominion over a corporation occupied a fiduciary relation to it and to its creditors equal at least to that held by a director, that this relation, nevertheless, only prevents it from gaining an advantage over the corporation through the means of this power or control, and does not deprive it from obtaining a preference through judicial proceedings where such power or control is not used to gain such advantage. In other words, it was held that one occupying this fiduciary relation might, nevertheless, bring an action and take all incidental steps to enforce collection of his debt, and that the same would be

[18] (1898), 121 Cal. 438, 53 Pac. 918.
[19] (1864), 2 Wall. 191, 17 L. Ed. 839.

upheld so long as he did not use his power or control over the corporation to further such ends. The court further held that it was immaterial whether the statement in the affidavit that the debt was unsecured was true or false since the defendant in that action, the Development Company, was a New Jersey corporation, and it must, therefore, be held a non-resident within the meaning of the attachment law.[20] As to non-residents, of course no such affidavit is required.

The result of this holding was that plaintiff, through the legal lien on the California property and the equitable lien on that in Mexico, had a first lien upon the entire system; the Salt Company had a second lien upon the part of the system lying in California, with a third lien, equitable in character, upon the part in Mexico; while the Southern Pacific Company had a second lien, equitable in character, upon the part of the system lying in Mexico, and a third lien upon the part in California. This presented, of course, a very interesting question as to the manner of distributing the surplus of the purchase price after payment of plaintiff's judgment. The Supreme Court met this by directing that the trial court should make an appraisement of the value of that part of the system lying in California and of that part lying in Mexico, and should direct the payment of the surplus to the Salt Company and the Southern Pacific Company respectively in the proportion that the value of the California end of the system bore to that part of the system lying in Mexico. In this manner it will be seen the rights of all parties were fairly and equitably protected. Thus a long, complicated and important litigation is brought to a close.

During the course of the litigation a number of interesting questions arose incidentally, some of which have been settled by the Supreme Court. The first of the many appeals was taken by the New Liverpool Salt Company from the order appointing a receiver. A receiver was appointed under subdivision 2 of section 564 of the Code of Civil Procedure, which provides that a receiver may be appointed in an action to foreclose a mortgage lien when the mortgaged property "is in danger of being lost, removed or materially injured." The moving papers on which the order was

[20] Barbour v. Paige Hotel Co. (1894), 2 D. C. App. 174; Voss v. Marbel Co. (1902), 101 Ill. App. 373; Albright v. United Clay etc. Co. (1904), 5 Penn. (Del.) 198, 62 Atl. 726; Cowardin v. Universal L .D. Co. (1879), 32 Gratt. 445.

based show that many parts of the system and structures necessary to its proper operation were in a greatly weakened condition and apt at any time to break out and be destroyed; that they could only be strengthened and preserved through the appointment of a receiver with power to take such action as might be necessary in the premises. The order of appointment was based chiefly upon this showing. Upon this appeal the court in bank first affirmed the order. Thereafter a rehearing was granted, and on the second hearing the order was reversed. The reversal was based upon the fact that it was not made to appear that the value of the mortgaged property after the threatened partial destruction would be insufficient to discharge the mortgage debt, and it was held that this was essential to justify the appointment of a receiver. It was held, however, that the order under such circumstances was simply erroneous, not void, and therefore that it was in full force and effect as to all defendants except the Salt Company.[21] It is submitted that this of all the decisions which the Supreme Court has been called on to render in this litigation is the one most fairly open to question. Section 564 provides that a receiver may be appointed in an action for the foreclosure of a mortgage "where it appears that the mortgaged property is in danger of being lost, removed or materially injured *or* that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." These conditions are in the alternative, from which it would seem clearly to follow that they were intended to be separate grounds and to afford independent basis for the appointment of a receiver. The Supreme Court in its opinion concedes that the record on which the order was based showed that the mortgaged property was in danger of being substantially injured. The court in the course of its opinion says: "The injuries from washouts would doubtless be substantial both in value and in character;" yet it holds that unless it is shown that the property after the injuries have been inflicted will be insufficient to discharge the mortgage debt, it is an abuse of discretion to make the appointment. Thus in practical effect the statute is made to read that a receiver may be appointed where the mortgaged property "is in danger of being lost, removed or materially injured *and* after such loss, removal or

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[21] Title Ins. & Trust Co. v. California Dev. Co. (1912), 164 Cal. 58, 127 Pac. 502.

injury, it will probably be insufficient to discharge the mortgage debt *or* that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." It is submitted that the soundness of this construction is very doubtful. It would appear that the words "materially injured" were used in the sense of "substantially injured." The construction given by the court very nearly, if not entirely, places the grounds of appointment in the conjunctive, where the statute places them in the disjunctive. The argument of the court that the purpose of the appointment of a receiver is to protect the security of the mortgage, and that this security is not impaired unless it can be shown that the value of the mortgaged property will be reduced below the amount of the mortgage debt, does not, it is submitted, answer the foregoing objection, either legally or practically. Legally the word "or" is clearly used in the disjunctive not in the conjunctive. Practically we all know that no person would loan money up to the full value of the security. Hence any substantial destruction of the mortgaged property is a substantial and material impairment of the mortgage security, even though it may still leave the property worth somewhat more than the amount of the mortgage debt.

The next appeal was taken by Boaz Duncan, a holder of bonds, who intervened in the action. He did not become a party until after the order appointing a receiver. Immediately after he became a party, he made a motion to vacate the order appointing a receiver, which motion was denied, and from the order denying said motion, took an appeal. He also appealed from certain other orders thereafter made directing the issuance of receiver's certificates and making them a first lien upon the property. Upon motion of plaintiff all of these appeals were dismissed. As to the appeal from the order denying the motion to vacate, the court held that it was not an appealable order even though the intervenor was not a party at the time the original appointment was made. The court further held that the orders authorizing the issuance of receiver's certificates were not appealable orders and overruled the appellant's contention that they were in effect final judgments in a collateral proceeding and therefore should be treated as final judgments for the purposes of appeal.[22]

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[22] Title Ins. & Trust Co. v. California Dev. Co. (1911), 159 Cal. 484, 114 Pac. 838.

A purported appeal was taken from the main decree by the California Development Company which raised an interesting question. A notice of appeal on behalf of the California Development Company was filed before the time for appeal had expired, by attorneys who believed they had authority to act for the California Development Company. A motion was made to dismiss the appeal upon the ground that the attorneys though acting honestly, were mistaken in the belief that they had the authority to represent the Development Company. It was shown that they were in fact mistaken and that they never had had authority from the Development Company to take the appeal. *Thereupon and after the time for appeal had expired,* the board of directors of the Development Company passed a resolution wherein they attempted to ratify the action of such attorneys in taking the appeal as of the date on which it was taken. It was held, however, that since the action of the attorneys had been unauthorized, even though in good faith, their action was not the action of the party, and was therefore inoperative; that upon the expiration of the time for appeal the judgment became final as against the party and that subsequent attempts by the party to ratify the action of the attorneys could not avail. The appeal was, therefore, dismissed.[23]

Upon taking its appeal from the foreclosure decree the Southern Pacific filed a bond in the sum of three hundred dollars and contended that, thereupon, the execution of the judgment was stayed. Its contention was that since the judgment directed the sale of certain real estate and certain pledged stock as an entirety, and since it had been held in the case of Rohrbacher v. Superior Court[24] that a decree for the sale of pledged stock was stayed by a three hundred dollar bond, the entire sale was necessarily stayed. The court, however, overruled this contention, holding that since the judgment primarily directed a sale upon foreclosure, it was incumbent upon appellants, if they would stay the sale, to furnish such security as the statute required for staying the operation of a judgment foreclosing a lien on real estate. The opinion apparently establishes the proposition that where a judgment directs the sale, as an entirety, of various kinds of property, it is necessary in order to stay the sale to do such acts

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[23] Title Ins. & Trust Co. v. California Dev. Co. (1914), 168 Cal. 397, 143 Pac. 723.

[24] (1904), 144 Cal. 631, 78 Pac. 22.

as would be necessary to stay the operation of every part of the judgment.[25]

Another interesting opinion was rendered upon the dismissal of the appeals of several individual defendants holding shares of stock of the old Mexican Company.[26]

Probably the most impressive feature of the litigation we have been discussing is the recognition of the broad powers of the court of equity to establish and enforce the principles of equity and to compel compliance therewith by personal process upon all parties subject to its jurisdiction. Intimately connected with this feature is the recognition and striking illustration of the principle that what is ordinarily termed "an equitable lien" is not in truth a lien at all—is not in any sense a right in rem or even quasi in rem—but is purely and strictly a *personal obligation.* This is a principle, a clear understanding of which is highly important to a true determination of questions involving apparently a conflict of law. Once the principle is recognized, however, it follows clearly that the law of the place of the contract, and not the law of the situs of the property, governs with reference to these obligations, as it does always with reference to the personal rights and duties created by a contract. It is equally clear, of course, that this is not at all inconsistent with the general principle that the law of the situs of the real property governs with reference to vesting of strict legal liens or rights in rem or the transfer of title to real estate. A true analysis is that the so-called equitable liens, being mere personal obligations, do not fall within this classification, and that a decree in personam rendered against a party within the jurisdiction of the court, even though it directs him to do certain acts and things which will affect the title to real estate in another jurisdiction, in no sense conflicts with this principle.

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[25] The opinion in this case is found in Southern Pacific Co. v. Superior Court (1914), 167 Cal. 250, 139 Pac. 69.

[26] The opinion is to be found in Title Ins. & Trust Co. v. California Dev. Co. (1914), 168 Cal. 397, 143 Pac. 723, but is probably of little practical importance for the future in view of the recent amendment to the statute relating to appeals.